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Nos. 201 and 202

In the Supreme Court of the United States

OCTOBER TERM, 1942

AMERICAN MEDICAL ASSOCIATION, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

THE MEDICAL SOCIETY OF THE DISTRICT OF COLUMBIA, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia (R. 1886) is not yet reported. The opinion of the Court of Appeals reversing a judgment sustaining a demurrer to the indictment is reported in 110 F. (2d) 703. The opinion of the

District Court sustaining the demurrer is reported in 28 F. Supp. 752.

JURISDICTION

The judgments of the Court of Appeals were entered on June 15, 1942 (R. 1908–09). The petition for writs of certiorari was filed on July 3, 1942. Jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and as modified by Rule XI of the Rules of Practice and Procedure in Criminal Cases.

QUESTIONS PRESENTED

Petitioners, two medical societies, were engaged in a combination to hinder and obstruct by means of boycotts the operation of Group Health Association, Inc., a non-profit cooperative association of government employees formed in the District of Columbia to provide for the rendition of medical care and hospitalization to its members. The boycotts induced by petitioners consisted of concerted refusals by petitioners' members to serve upon the cooperative's medical staff or to consult with the doctors comprising that staff and concerted refusals by the Washington hospitals to permit the cooperative's doctors to treat its members in those institutions; the boycotts resulted in restraints upon the operation of the cooperative, upon doctors in the pursuit of their callings, and upon the hospitals in the operation of their business. The

principal question presented is whether the combination was "in restraint of trade" within the meaning of section 3 of the Sherman Act.

Other subordinate questions presented are (1) whether the conduct for which petitioners were convicted arose from a dispute concerning terms and conditions of employment within the meaning of section 20 of the Clayton Act so that petitioners were immune from prosecution for such conduct; (2) whether Group Health Association was operating in violation of District of Columbia statutes relating to the practice of medicine and the business of insurance and, if so, whether the violation of these statutes by the cooperative is a material consideration in appraising the lawfulness of petitioners' combination; (3) whether the acquittal of the individual defendants by the jury requires that the verdict against petitioners be set aside; (4) whether certain allegations of the indictment were irrelevant and prejudicial; (5) whether the District Court erred in the admission of evidence; (6) whether the District Court erred in the exclusion of evidence; and, (7) whether the District Court erred in its instructions to the jury.

STATUTES INVOLVED

Section 3 of the Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. C., title 15, sec. 3), known as the Sherman Act, provides:

> Every contract, combination in form of trust or otherwise, or conspiracy, in re-

straint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. * * *

Section 20 of the Act of October 15, 1914, c. 323, 38 Stat. 738, as amended (U. S. C., title 29, sec. 52), known as the Clayton Act, provides:

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, * * *

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain

from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

STATEMENT

Petitioners, the American Medical Association and the Medical Society of the District of Columbia, are two incorporated medical associations which, with 21 of their individual officers and members, were tried upon an indictment charging a violation of section 3 of the Sherman Act (R. 1–21, 29–30). The jury convicted the petitioners and acquitted the individual defendants (R. 44–45).

Prior to trial, the District Court sustained a demurrer to the indictment and dismissed it (R. 21–25). *United States* v. *American Medical Association,* 28 F. Supp. 752. The Government appealed to the Court of Appeals and, before the appeal was heard, petitioned this Court for certiorari. The writ was denied. 308 U. S. 599. Thereafter, the

Court of Appeals reversed the judgment of the District Court and remanded the case for trial (R. 26–28). 110 F. (2d) 703. A petition by the defendants for certiorari was denied. 310 U. S. 644.

The indictment (R. 1–21) charged the petitioners with engaging in a combination and conspiracy to hinder and obstruct the operation of a non-profit cooperative association of government employees formed in the District of Columbia to provide for its members medical care through a salaried medical staff and hospital accommodations in the District of Columbia hospitals. It alleged that the combination sought to achieve its object by inducing petitioners' members and the Washington hospitals to boycott the cooperative and the members of its medical staff. The indictment charged that these boycotts resulted in restraints upon the operation of the cooperative, upon doctors in the pursuit of their callings, and upon the hospitals in the operation of their business. When the case was first before the court below, it held that these restraints upon the rendition of medical and hospital services, if proved, were restraints of trade in violation of section 3 of the Sherman Act. *United States* v. *American Medical Association*, 110 F. (2d) 703.

The evidence in the case is voluminous and supports every essential allegation of the indictment. The facts which the jury might have found from the evidence may be summarized as follows:

The American Medical Association [1] is the largest and most influential association in the medical profession, embracing within its membership almost 65 per cent of the doctors in the United States.[2] Affiliated with it are county and state medical associations located throughout the country.[3] The Medical Society of the District of Columbia,[4] with 825 members, is the District of Columbia affiliate of the AMA.[5]

On February 24, 1937, a non-profit cooperative association, called Group Health Association, Inc.,[6] was incorporated in the District of Columbia to provide for the rendition of medical care and hospitalization to members of the Association and their dependents in return for monthly dues from the members.[7] Membership in GHA is limited to civil employees of the executive branches of the United States Government.[8] The medical care which it offers is provided by a group of doctors engaged by GHA and compensated by salary.[9]

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[1] The association will sometimes hereinafter be referred to as the AMA.

[2] R. 112–13; Exs. 1 (R. 90) 3 (R. 113–16). All exhibits cited in this brief are those of the Government.

[3] Ex. 1, R. 91, 1581; R. 1028.

[4] The society will sometimes hereinafter be referred to as the DMS.

[5] Ex. 1, R. 89–91.

[6] Group Health Association will sometimes hereinafter be referred to as GHA.

[7] R. 149–51; Ex. 1, R. 95, 1242.

[8] Ex. 1, R. 1212.

[9] Ex. 37, R. 293.

The plan of GHA to provide medical care on a pre-payment basis through a salaried staff of doctors was condemned by petitioners as being in violation of the Principles of Medical Ethics of the AMA and, therefore, "unethical".[10] Although there is conflict in the record as to the reason for petitioners' opposition, there is abundant evidence to show, and the court below concluded,[11] that it was inspired by a fear that GHA would attract a substantial number of government employees who were actual or potential patients of doctors in private practice in Washington with a resulting reduction in the income of those doctors. A few illustrations of the evidence of this competitive aspect of the case are set forth in the margin.[12]

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[10] Exs. 36 (R. 276–78, 283–90) 37 (R. 319–23, 357–58, 387–90), 177 (R. 317–18), 135 (R. 316–17), 293 (R. 368–86). The Principles of Medical Ethics define certain standards of conduct which all members of petitioners are obliged to observe. Ex. 1 (R. 851–63, 1557); R. 1073–79.

[11] R. 1890–91.

[12] Among the Principles of Medical Ethics is a provision which condemns as "un-professional" the rendition by a physician of services under conditions "which interfere with reasonable competition among the physicians of a community" (R. 860). The DMS declared GHA "unethical" because it violated this provision (Ex. 37, R. 287–88). Another provision condemns "contract practice"—that is, the rendition of medical care to a group of individuals by a doctor on a salary basis—"when there is interference with reasonable competition in a community" (R. 860). The DMS expelled a member on the ground that his contract with GHA violated this provision. (Ex. 37, R. 559–61.)

Frequent warnings were voiced by the individual defendants and others concerning the competitive threat to the

The condemnation of GHA as "unethical" led to the formulation by the petitioners of the plan to force the cooperative out of business for which petitioners were convicted. The plan consisted of (1) action by the DMS forbidding its members to join the medical staff of GHA or to consult with members of the staff, (2) the institution of disciplinary proceedings against DMS members who violated these prohibitions, and (3) the coercion of the Washington hospitals to exclude GHA doctors from the staffs of the hospitals and thus to prevent

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private practice of medicine which GHA offered. The defendant Woodward, in an article in the Journal of the American Medical Association discussing GHA, called attention to the fact that GHA might include approximately three-fourths of the Washington population and stated (Ex. 293, R. 385):

> The effect of the withdrawal from private practice of even one-half that number of persons, all of whom are able to pay for medical services, will materially disturb medical practice in the District of Columbia and react against public interest.

A spokesman for the DMS at a meeting with GHA pointed out that membership in GHA was open to substantially all government employees and said (Ex. 10, R. 194):

> * * * But let us get down to cases and consider what would happen in the District of Columbia provided you were able to obtain the maximum of enrollment in this corporation. As I pointed out a while ago, it would involve about one-third of the population of the District of Columbia. Well, one-sixth anyhow, of actual subscriptions, because there are about 100,000 employees. Multiply that by 3.3, you see what it would do here as an economic thing. * * * It would simply result in the necessary exodus of a

these doctors from treating their GHA patients in the hospitals.

(1) The constitution of the DMS prohibits professional relations by members with any organization not approved by the DMS.[13] On July 12, 1937, shortly after GHA was incorporated, the executive committee of the DMS adopted and circulated among its members a list of approved organizations from which GHA was omitted.[14] There was substantial evidence to show that the list was in fact a "white list" intended to warn petitioners' members against joining the staff of GHA or consulting with the members of its medical staff.[15] Four members of the DMS declined positions on the staff of GHA because of this action

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large part of the medical profession of the District of Columbia. * * *

The defendant McGovern is quoted as follows in the minutes of one of the DMS meetings (Ex. 37, R. 358):

> Dr. McGovern said that he looked upon this Group Health Association movement as an organization coming in and interfering with his business. He added that he expected to be in practice for some 20 years and he did not propose, if it could be avoided at all, to have an organization such as was proposed to interfere with his work and income. "Just what are you fellows going to do about it?"

Other similar excerpts from the record are quoted in the opinion of the court below (R. 1890–93, fn. 23).

[13] Ex. 1, R. 1559.

[14] Ex. 37, R. 331–34.

[15] Exs. 37 (R. 322, 334, 351, 362, 387), 45 (R. 341); R. 1197.

of the DMS;[16] another declined for the same reason to consult with a GHA doctor concerning patients seriously ill with heart disease.[17]

(2) When two members of the DMS joined the staff of GHA, the DMS instituted proceedings to expel them from the DMS and the AMA.[18] The proceedings resulted in the resignation of one of the doctors from the staff of GHA, with a consequent dismissal of the proceedings, and the expulsion of the other doctor from the DMS.[19] Disciplinary proceedings were also instituted by the DMS against a member because of an alleged consultation with a GHA doctor, and the proceedings were dismissed only upon assurances from the member that he would avoid such consultations in the future.[20]

(3) While the greater part of the Government's evidence in the case concerns the action of the petitioners to induce the Washington hospitals to boycott GHA by denying hospital privileges to its staff, the formal proceedings of the DMS sufficiently reveal the action taken and the results achieved in this respect.

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[16] R. 237, 151–52, 1357–58; Ex. 37, R. 408.
[17] R. 951–54; Exs. 458, 459 (R. 544–47).
[18] Exs. 39, 62, 63 (R. 453–56).
[19] Exs. 37 (R. 458–60), 60 (R. 461); R. 653–54, 599–60.
[20] R. 666–69; Exs. 567–569; 37 (R. 672, 678, 680).

On November 3, 1937 the DMS adopted the resolution quoted in the margin,[21] instructing its hospital committee to recommend a plan for preventing patients of GHA from being received in the Washington hospitals.[22] Upon the recommendation of the hospital committee the DMS adopted and sent to all of the hospitals a resolution recommending to the hospitals that they require that all members of their staffs be members of the DMS

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[21] "WHEREAS, The Medical Society of the District of Columbia has an apparent means of hindering the successful operation of Group Health Association, Inc., if it can prevent patients of physicians in its employ being received in the local private hospitals; and

WHEREAS, The Medical Society of the District of Columbia has no direct control over the policies of such hospitals as determined by their lay boards of directors, except through its control of its own members serving on their medical staffs; and

WHEREAS, Conflicts between the Medical Society of the District of Columbia and any local hospitals arising from an attempt to enforce the provisions of Chapter IX, Article IV, Section 5, of its Constitution should be assiduously avoided, if possible, because of the unfavorable publicity that would accrue to its own members; therefore, be it

RESOLVED, That the Hospital Committee be, and is hereby, directed to give careful study and consideration to all phases of this subject and report back to the Society, at the earliest practicable date, its recommendations as to the best way of bringing this question to the attention of the medical boards and boards of directors of the various local hospitals in such a manner as to insure the maximum amount of practical accomplishment with the minimum amount of friction and conflict.

[22] Ex. 37, R. 422-23.

and the AMA.[23] Shortly thereafter the hospital committee reported as follows:[24]

> On February 2, 1938 the Medical Society adopted a resolution requesting, at the next stated meeting, the facts relating to the present status of Group Health physicians at the various Washington hospitals, preliminary to appropriate disciplinary action in event any hospital had ignored the Medical Society's wishes in the premises.
>
> This resolution was referred to the Executive Committee and in turn to the Hospital Committee.
>
> The Hospital Committee reports that, at this time, the majority of local private hospitals contain in their by-laws a provision that a physician in order to practice in the hospital must be a member or qualified for membership in his or her local Medical Society
>
> Only three of the local hospitals (Columbia, Sibley and George Washington) have not followed this recommendation of the American Medical Association.
>
> All of the local private hospitals are cooperating fully with the Medical Society in respect to Group Health Association, Inc. At the present time only one of the local hospitals has on its staff list the name of a physician connected with Group Health Association, Inc. This hospital does not re-

[23] Exs. 37 (R. 459), 495 (R. 608), 506 (R. 605), 498 (R. 599–600), 617 (R. 727); R. 1342.

[24] Exs. 324 (R. 556–58), 37 (R. 565–67).

vise its staff list annually, as do the other hospitals, but it has assured the Chairman of the Hospital Committee that steps have been taken to deny this physician hospital privileges.

The Hospital Committee urges that the Medical Society continue their full cooperation and avoid conflict with any of the local private hospitals.

The action of the DMS described in the foregoing discussion was undertaken with the knowledge and approval of the AMA. The AMA was in a large measure responsible for shaping the hostile policy of its local affiliate toward GHA which led to the boycotts;[25] through its Journal it warned the profession that doctors associated with GHA were "certain to lose professional status" which would handicap the organization in obtaining "consultant service and hospital accommodations";[26] and it was kept fully advised of the steps taken by the DMS to prevent professional relations between petitioners' members and GHA and to exclude GHA doctors from the Washington hospitals.[27]

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[25] R. 152, 890–91; Exs. 106 (R. 315–16), 177 (R. 317–18), 135 (R. 316–17), 293 (R. 368–86).

[26] Ex. 293 (R. 368, 385).

[27] R. 326, 891–93, 903, 908, 922, 938, 963–64, 1029–30; Exs. 136 (R. 436), 37 (R. 327, 345–46, 441, 445–49, 567); 45 (R. 341), 110, 111 (R. 401); 117 (R. 427, 434–35), 147 (R. 563–64), 186 (R. 352–53), 187 (R. 353–54), 188 (R. 354), 190 (R. 359), 198 (R. 318–19), 199 (R. 319), 201 (R. 342), 203, 114 (R. 410), 192 (R. 900), 292 (R. 326).

There was also substantial evidence warranting the inference that the AMA was directly instrumental in obtaining the exclusion of the GHA doctors from the Washington hospitals.[28]

Upon the facts recited above, the District Court charged the jury that it might convict the defendants if it found that they had engaged in the combination charged by the indictment (R. 1507–08). On appeal, the Court of Appeals reaffirmed its first holding that the combination was "in restraint of trade" (R. 1886–93) and held that no error was committed either in the trial of petitioners or in the rulings upon their post-verdict motions (R. 1894–1907).

ARGUMENT

I

The Government appealed from the decision sustaining the demurrer to the indictment, and prior to argument in the Court of Appeals petitioned for certiorari on the ground that the importance of the question whether the combination alleged was in restraint of trade warranted direct review by this Court similar to that which would have been available as a matter of right under the Criminal Appeals Act had the case originated outside the Dis-

[28] Exs. 215, 243 (R. 273–74), 223 (R. 274–75), 227, 228 (R. 275–76), 236 (R. 265–66), 237 (R. 268), 238 (R. 269), 239 (R. 270), 241 (R. 271–72), 242 (R. 272–73); R. 784–85, 838–39.

trict of Columbia. *United States* v. *American Medical Association*, October Term, 1939, No. 377, Pet. pp. 9–12. Certiorari was denied. 308 U. S. 599. After the Court of Appeals reversed the decision of the District Court, the defendants petitioned for certiorari and the Government opposed on the grounds both that the judgment was not final and that the holding of the Court of Appeals did no more than give application to settled doctrines. *American Medical Association* v. *United States*, October Term, 1939, No. 959, Brief for the United States in Opposition, pp. 11–15. Again certiorari was denied. 310 U. S. 644. In view of these two denials of certiorari, together with the fact that the decision is probably limited in effect to the District of Columbia, that the question has received comprehensive treatment by the Court of Appeals, and that the decision appears to be clearly correct, the Government does not feel warranted in acquiescing in the granting of the writ.

1. Petitioners contend (Pet. 19) that the Court of Appeals did not give proper effect to applicable decisions of this Court in holding that the phrase "restraint of trade" in section 3 of the Sherman Act embraces restraints upon the rendition of medical services. The Government submits that the cases cited by petitioners do not lend any support to this contention. Only *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, and *Apex*

Hosiery Co. v. *Leader*, 310 U. S. 469, seem sufficiently relevant to require comment.[29]

The *Cleaners & Dyers* case held that the "restraint of trade" forbidden by section 3 of the Sherman Act is not, so far as it relates to activities in the District of Columbia, confined to restraints upon the buying and selling of commodities, but includes restraints upon the performance of services, such as dyeing, cleaning, or renovating wearing apparel. The Court supported this conclusion by a quotation from the opinion in *The Schooner Nymph*, 18 Fed. Cas. 506, rendered by Mr. Justice Story while sitting as a circuit justice. Petitioners rely upon the portion of one sentence in this quotation in which Mr. Justice Story intimated that the practice of the learned professions was not a "trade". This statement was not pertinent to any question considered in the *Cleaners & Dyers* case, and it was *dictum* only in *The Schooner Nymph*.

Petitioners' assertion (Pet. 20) that the decision of the Court of Appeals is inconsistent with *Apex*

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[29] The other cases cited (aside from *Federal Baseball Club* v. *National League*, 259 U. S. 200) did not arise under the Sherman Act. They construed the terms of other federal statutes, state legislation, or private contract. The *Baseball* case turned on the meaning of the term "commerce" as used in sections 1 and 2 of the Sherman Act. The scope of section 3 of the act is not governed by the scope of sections 1 and 2; this Court has held that section 3 is to be interpreted "as though it were a separate and independent act", disassociated from the prior sections. *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 435.

Hosiery Co. v. *Leader, supra,*[30] is based on the argument that the Court in that case construed the Sherman Act as applying only to combinations which are intended to or in fact do affect market prices. Substantially the same argument was made in *General Motors Corporation* v. *United States,* No. 352, October Term, 1941, Petition, pp. 16–22. Certiorari was denied. 314 U. S. 618. The argument does violence to the opinion of the Court in the *Apex* case,[31] ignores the holding in the later case of *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U. S. 457, 466, that the regulating of prices and the limiting of production do "not exhaust the types of conduct banned by the Sherman and Clayton Acts", and seeks to give an interpretation to the *Apex* case in conflict with the

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[30] In that case, plaintiff, a hosiery manufacturer, charged that the defendant union and its officers had violated the Sherman Act by engaging in a sit-down strike for the purpose of enforcing a demand for a closed shop and by preventing the interstate shipment of goods already manufactured. Upon these facts, the Court held that the unlawful interference by combination and conspiracy with the movement of goods across state lines was not without more a violation of the statute.

[31] The Court expressly stated that the act applies to "restraints * * * which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services." [310 U. S. at 493.] The opinion further stated that the Act is applicable where the "restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition." [310 U. S. at 501.]

line of cases in which the Court has held, without consideration of the effect upon the price structure, that combinations to boycott competitors are in violation of the Sherman Act.[32]

The Government submits that the element of "commercial competition" which the Court found lacking in the *Apex* case is plainly present in the case at bar. In the *Apex* case the Court concluded that the combination "did not have as its purpose restraint upon competition in the market for petitioner's product", that its object was solely to compel the company to accede to the union demands for a closed shop (310 U. S. at 501). Here, as the Statement has indicated (*supra*, pages 8–10), the dominating purpose of petitioners was to suppress the competition of GHA in the market for medical services. And the verdict of the jury necessarily constitutes a finding to this effect, since the Court instructed the jury that to convict the defendants it must find that they "intended to prevent Group Health Association from competing with doctors engaged in private practice on a fee-for-service basis * * *": (R. 1498, R. 1509).[33]

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[32] *Montague & Co. v. Lowry*, 193 U. S. 38; *Loewe* v. *Lawlor*, 208 U. S. 274; *Eastern States Lumber Dealers' Association* v. *United States*, 234 U. S. 600; *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291; *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30; *United States* v. *First National Pictures, Inc.*, 282 U. S. 44; *Fashion Originators' Guild* v. *Federal Trade Commission*, *supra*.

[33] For the same reasons the decision does not conflict with *United States* v. *Gold*, 115 F. (2d) 236 (C. C. A. 2); *Gunder-*

The holding below, even though not directly governed by any prior decision of this Court, does no more than give application to doctrines now settled. Those doctrines are: (1) Section 3 of the Sherman Act is not to be given a narrow construction; Congress in enacting this section "meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade."[34] (2) The phrase "restraint of trade," as used in the Sherman Act, had its genesis in the common law, and its use at common law is the general measure of its scope.[35] (3) The courts both of this country and of England have held, for almost a century and a half, that restraints upon the rendition of medical services are embraced within the restraints of trade condemned by the common law.[36]

2. Petitioners also urge (Pet. 20) that the question decided by the Court of Appeals is one of substance relating to the construction of a statute of

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sheimer's, Inc. v. *Bakery and Confectionery Workers' International Union*, 119 F. (2d) 205 (App. D. C.); *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 119 F. (2d) 892 (C. C. A. 8); or *United States* v. *Local 807*, 118 F. (2d) 684 (C. C. A. 2).

[34] *Atlantic Cleaners & Dyers, Inc.*, v. *United States*, 286 U. S. 427, 435.

[35] *Standard Oil Co.* v. *United States*, 221 U. S. 1, 51, 59; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 494–498. For additional authorities see *United States* v. *American Medical Association*, 110 F. (2d) 703, 707–708.

[36] See the authorities cited in *United States* v. *American Medical Association*, 110 F. (2d) 703, 709–711.

the United States. But the court has construed only section 3 of the Sherman Act and only in so far as that section relates to activities wholly within the District of Columbia. See *Ex parte Bakelite Corp.*, 279 U. S. 438, 450. The decision below is therefore the equivalent of the construction of a statute limited in its operation to the District of Columbia, which this Court will not ordinarily review. *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285.

It is unlikely that the holding of the Court of Appeals that restraints upon the practice of medicine fall within the meaning of the words "restraint of trade" in section 3 will influence the enforcement of the Sherman Act beyond the District of Columbia. Section 1, which also prohibits combinations "in restraint of trade", is limited in its application to restraints affecting *interstate* trade and commerce. Since the practice of medicine is usually an *intrastate* activity, it is not likely that section 1 could be invoked against restraints upon the practice of medicine in the states.

The Government recognizes, however, that the decision below may have persuasive effect outside of the District of Columbia and involves important interests. If certiorari should be granted, it is respectfully urged that the grant be limited to the question whether the conspiracy of which petitioners were convicted constitutes a conspiracy in restraint of trade within the meaning of section 3 of the Sherman Act.

II

None of the subordinate questions raised by petitioners appears to be an appropriate subject for review by this Court. They involve rulings of the District Court which either are in accord with settled principles or are unlikely to have general application; their correctness depends largely upon an appraisal of the evidence, which this Court will not ordinarily undertake. *Houston Oil Co.* v. *Goodrich*, 245 U. S. 441. In any event, the opinion of the Court of Appeals clearly shows that the rulings were correct.

We do not believe that petitioners' attack on the rulings concerning admissibility of evidence and on the instructions to the jury and petitioners' claim that the indictment contains prejudicial and irrelevant matter require any discussion beyond the comments made in the margin.[37] Discussion of the other subordinate questions follows:

1. Petitioners contend (Pet. 21) that the holding of the court below that section 20 of the Clayton

[37] The only objection to the admission of evidence which the court below considered worthy of comment is that addressed to the evidence of conduct by the AMA in other parts of the country similar to that in the District of Columbia. This evidence was received only to show the plan and purpose of the AMA in the commission of the illegal acts charged by the indictment. The opinion of the Court of Appeals (R. 1903–06) and the numerous authorities upon which the court relies seem to leave no doubt about the soundness of the District Court's ruling admitting this evidence. The exclusion of evidence offered by petitioners (intended to show the illegal-

Act is inapplicable here conflicts with *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552; *Milk Wagon Drivers' Union, Local No. 753* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91; and *United States* v. *Hutcheson*, 312 U. S. 219. These cases are obviously not in point on the issue posed by petitioners. That issue is whether section 20 applies to disputes over the way in which doctors shall provide medical care in a community as well as to disputes concerning the terms and conditions of employment of laborers. None of the cases cited sheds any light on this issue since the Court had before it in each case a dispute arising out of the relations between employers and laborers, and neither the questions decided [38] nor the language

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ity of GHA's activities and the reasonableness of petitioners' combination) is directly sustained by the decision of this Court in *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, 468. Petitioners' objections to the court's charge to the jury upon the major issues in the case are answered by the discussion of these issues in the text of this brief in opposition (see pages 16–20, 22–26). Petitioners' other objections to the charge are, we submit, frivolous. The opinion of the court below sustaining the validity of the indictment plainly shows that the claim that the indictment contains prejudicial and irrelevant matter is without merit. *United States* v. *American Medical Association*, 110 F. (2d) 703, 715–716.

[38] *New Negro Alliance* v. *Sanitary Grocery Co.*, *supra*, held that discrimination in employment by reason of race or color concerned "terms or conditions of employment" within the meaning of the Norris-LaGuardia Act. In *Milk Wagon Drivers' Union* v. *Lake Valley Co.*, *supra*, the Court held that picketing by a union to compel so-called "vendors", who pur-

of the opinions indicates that section 20 has application to any other kind of dispute.[39]

The decision below is clearly correct and does not call for further review by this Court. Both the language of section 20 and its legislative history (portions of which are set forth in the opinion of the court below, R. 1894-95) show that it was intended to permit collective action of certain kinds by employees in order to offset the superior bargaining position of employers. Doctors, even though engaged by cooperatives on a salary basis, are not employees of the kind which the act was intended to protect; their independence of judgment and their freedom from supervision by those whom they serve cast them more in the role of independent contractors. Accordingly, the application of section 20 does not extend to disputes such as that giving rise to the present case. Cf. *Columbia River Packers Association* v. *Hinton*, 315 U. S.

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chase milk from dairies and sell and deliver it to retailers and others, to join the union fell within the protection of the Norris-LaGuardia Act. *United States* v. *Hutcheson*, *supra*, held that the parties to the dispute concerning terms and conditions of employment need not stand in the proximate relation of employer and employee.

[39] For the same reasons the decision of the court below is not in conflict with *Gundersheimer's, Inc.* v. *Bakery and Confectionery Workers' International Union*, *supra*, p. 206; *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, *supra*, p. 898; or *International Association of Bridge, Structural & Ornamental Iron Workers* v. *Pauly Jail Bldg. Co.*, 118 F. (2d) 615, 620 (C. C. A. 8).

143. Further, there is no reason of policy in favor of extending the provisions of section 20 to the present case, where there are absent the circumstances of inequality of bargaining power which underlay the Clayton Act's passage.

2. In *Jordan* v. *Group Health Association*, 107 F. (2d) 239, the Court of Appeals held that GHA was not operating in violation of District of Columbia insurance laws.[40] In *United States* v. *American Medical Association*, 110 F. (2d) 703, 714, the Court of Appeals, in passing upon the sufficiency of the indictment, held that GHA was not engaged in the practice of medicine in violation of the Healing Arts Practice Act of the District of Columbia.[41] Petitioners urge (Pet. 21-22) this Court in the present case to consider the correctness of these holdings, with a view to deciding that the activities of GHA were illegal, and that this is a material consideration in appraising the unlawfulness of petitioners' combination.

The statutes involved are obviously limited in their operation to the District of Columbia. Accordingly, the present case is not one for certiorari on the issue of violations of law by GHA, where the review would be only of correctness of the construction given the District of Columbia medical practice and insurance statutes by the Court of Appeals. *Del Vecchio* v. *Bowers*, *supra*, at 285.

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[40] D. C. Code, 1940, Title 35, sec. 202.

[41] D. C. Code, 1940, Title 2, sec. 102.

In any event, the holding of the court below that the combination was in violation of the Sherman Act irrespective of the legality of the operations of GHA is in full accord with decisions of this Court. The combination had for its object the suppression of the competition of GHA through the instrumentality of boycotts employed against the organization and its medical staff. This Court has consistently held that such a combination cannot be justified by a showing that it was intended to eliminate unfair or fraudulent practices, or that the competition which it sought to suppress was the product of unlawful conduct. *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, 468; *United States* v. *First National Pictures, Inc.*, 282 U. S. 44; *Eastern States Lumber Dealers' Association* v. *United States*, 234 U. S. 600.

3. Contrary to petitioners' claim (Pet. 22–23), the decision of the Court of Appeals that the verdict against petitioners might stand despite the acquittal of the individual defendants is in agreement with the only relevant decisions of circuit courts of appeals. The Seventh Circuit reached the same conclusion as the court below upon facts identical with those here involved. *General Motors Corp.* v. *United States*, 121 F. (2d) 376, 411, certiorari denied, 314 U. S 618. In *United States* v. *Austin-Bagley Corp.*, 31 F. (2d) 229, 233, the Second Circuit sustained a verdict convicting certain

defendants which was inconsistent with a verdict acquitting other defendants. Certiorari was denied. 279 U. S. 863. See Petition, *Austin-Bagley Corp* v. *United States*, No. 820, October Term, 1928, pp. 6–7.[42]

The ruling of the court below is also in harmony with the applicable decisions of this Court. *Dunn* v. *United States*, 284 U. S. 390, and *Borum* v. *United States*, 284 U. S. 596, hold that a verdict of conviction upon one count of an indictment may stand although it is inconsistent with a verdict of acquittal upon another count. We submit that no distinction should be made between inconsistent verdicts upon one count of an indictment and inconsistent verdicts upon two counts of the same indictment. The holding of the Court of Appeals, therefore, accords with the principle of the *Dunn* case that "consistency in the verdict is not necessary." *Dunn* v. *United States*, *supra*, at 393.

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[42] The line of cases in the federal courts relied upon by petitioners here (Pet. 41, fn. 26) holding or intimating that the acquittal of one of two defendants indicted and tried for conspiracy requires that the conviction of the other be set aside is inapplicable in the present case since two of the defendants were convicted. The state cases cited (Pet. 41, fn. 27), holding that a verdict returned against a principal for a tort committed by his agent must be set aside if the agent is acquitted, recognize that this principle is confined to cases where the act of the agent is unauthorized by the principal and the latter's liability is predicated only upon the doctrine of respondeat superior. In this case, as the Statement shows (*supra*, pages 8–15), the combination was formed and carried out pursuant to formal corporate action of the petitioners.

CONCLUSION

The decision below is correct and presents no conflict with decisions of this Court or of circuit courts of appeals. It is therefore respectfully submitted that the petition for writs of certiorari should be denied.

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